In the Supreme Court
OF THE
United States

Office - Supreme Court, U.S.
FILED
JUN 26 1944
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Petitioner, Ernest H. Denicke, moves this Court for an order directing issuance of a writ to the Clerk of the

United States Circuit Court of Appeals for the Ninth Circuit, to compel performance of the duties herein specified, required to complete transcript of record.

1. To Forward Original Document.

That said Clerk be required to transmit the following to the Clerk of this Court:

> Original typewritten opinion bearing signatures of Circuit Judges Clifton Mathews, Albert Lee Stephens, and William Healy, filed April 27, 1944, in Appeal No. 10,347.

Reasons.

(a) A true copy of the whole of such document was designated. (R. 128, Item 6.) The Clerk printed the body of such opinion. (R. 115 at 123.) The signature clause was left out. (R. 123.) It is the duty of counsel to suggest diminution and to take steps to correct such record in order that this Court may have the facts before it. A false certificate is attached to such record. This states that the incomplete copy of the opinion as so printed, constitutes a true copy of the original. (R. 132.)

(b) The matter disclosed in the omitted signature clause has bearing on the application for certiorari presented herewith. Petition is being filed without prior request for reassignment or rehearing in bank in the Circuit Court. That Court has a present membership of six. Reassignment and rehearing are alike impossible except by the vote of four judges. Our petition contains statement of reasons for making a direct application to this Court. We are entitled to a record which will show that three members of the Circuit Court signed an opinion

evidencing deliberate refusal to pass upon the questions presented in support of appeal.

2. To Forward Transcript of Oral Argument on Appeal.

That said Clerk be required to transmit the following to the Clerk of this Court:

> Original of reporter's transcript of oral argument of Appeal No. 10,347 presented to Circuit Judges Clifton Mathews, Albert Lee Stephens, and William Healy on Feb. 15, 1944, which transcript was duly filed on March 2, 1944.

Reasons.

On certiorari the following contention is made—that the Circuit Court was under a duty to decide all questions presented, and that its opinion should include adequate reference thereto.

The third count of petitioner's complaint raised an independent ground of jurisdiction based upon publication of a false balance sheet before the merger of June 30th, 1932. Such publication was alleged to be in violation of 12 USCA 161. Directors were charged with liability for that violation under 12 USCA 93. Jurisdiction over that count was claimed by virtue of the decision of this Court in *Chesbrough v. Woodworth,* 244 US 72.

During oral argument serious consideration was given to this third count. The Court acknowledged the importance of the questions presented therein. In spite of those facts it rendered an opinion in which the statements contained in that count are suppressed. The following portions of the Reporter's Transcript of Oral Argument concern that matter:

Remarks During Opening Argument (page 17, line 24 to page 18, line 5, inclusive);

Respondents' Argument (page 37, line 26 to page 38, line 6, inclusive);

Rebuttal Argument (page 24, line 19 to page 26, line 10, inclusive).

These portions of the transcript are quoted in the affidavit filed herewith.

Reasons for Motion in this Court.

It is impossible to obtain relief except by resort to process available in this Court. Time does not permit petitioner to make a preliminary application in the Circuit Court. The filing of a motion in that Court would not afford relief.

DOCUMENTS PRESENTED IN SUPPORT OF MOTION.

1. Transcript of proceedings in Circuit Court, pages 108-132, inclusive, prepared and filed herein.

2. Affidavit filed herewith.

AUTHORITIES IN SUPPORT OF MOTION.

This Court has power to order the clerk of the lower Court to transmit any original document needed to complete a transcript of record. We cite 228 USCA 863, which provides:

> "Upon the appeal of any cause in equity . . . a transcript of the record . . . shall be transmitted to the Supreme Court. Either the court below or the

> Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof."

Under Section 262 of the Judicial Code (28 USCA 377), this Court has power to issue all necessary writs:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The certiorari power given by Section 240 of the Judicial Code (28 USCA 347), contains authority to do all acts and things required to make it effective. This includes power to ascertain the truth and to compel the making of an adequate record.

In the ordinary case, briefs and oral arguments are not deemed material or recognized as part of the record on a certiorari application. That is true because this Court does not find it necessary to review the intermediate steps taken in a Circuit Court—it acts independently on the legal questions presented.

We submit an entirely different question herewith. The Circuit Court has failed to exercise its appellate jurisdiction. It has rendered an inadequate opinion. That opinion discloses a refusal to determine the questions presented. Jurisdictional facts have been suppressed. The oral argument discloses that the Court had knowledge of the importance of those facts.

We suggest the following procedure on issuance of an order for transmittal of the original documents described:

1. The Circuit Court Opinion should be reprinted by the Clerk of this Court, or page 123 of the present transcript should be amended by an insertion containing the omitted signature clause.

2. Those portions of the Reporter's Transcript of Oral Argument, quoted in the affidavit filed herewith, and described in this Motion, have bearing on the conduct of the Circuit Court. These should be printed by the Clerk of this Court. We hereby designate those portions of such transcript and request proper action to permit their recognition as a Supplemental Transcript on Certiorari.

3. Any matter in such transcript desired by respondents as part of a supplemental record can be made the subject of a designation filed under Rule 9.

We seek issuance of a writ in the proper form to give this Court possession of the original documents specified.

Dated, San Francisco, California,
June 23, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing motion is well founded in point of law and fact and that the same is not presented for purposes of delay.

Dated, San Francisco, California,
June 23, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

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Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

United States of America,
State of California,
City and County of San Francisco.—ss.

Aaron M. Sargent, being first duly sworn, deposes and says:

I am the attorney for Ernest H. Denicke, the petitioner above named. This affidavit is made on his behalf and in support of "Motion to Correct Diminution and for Enlargement of Record.". I am familiar with the documents described therein, which are now part of the files of the Circuit Court of Appeals for the Ninth Circuit, in Appeal No. 10,347.

An original typewritten opinion was filed in such appeal on April 27, 1944. The following is a true copy of the signature clause at page 12 thereof:

> "Judgment affirmed.
>
> **Clifton Mathews**
> **United States Circuit Judge**
> **Albert Lee Stephens**
> **United States Circuit Judge**
> **William Healy**
> **United States Circuit Judge.**"

The matter printed in bold face type was not included in the transcript sent to this Court. (See R. 123.) The clerk of the Circuit Court attached the following certificate to such record:

> "I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred thirty-one (131) pages, numbered from and including 1 to and

including 131, to be **a full, true and correct copy of the entire record** of the above-entitled case in the said Circuit Court of Appeals, **made pursuant to request of counsel for the appellant,** and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, **as the originals thereof remain on file and appear of record in my office.**

"Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 24th day of May, 1944.

(Seal) Paul P. O'Brien,
Clerk."

The signature clause attached to such Opinion was not omitted pursuant to my request. The record transmitted to the Clerk of this Court is false in not including such clause.

The Circuit Court Opinion suppressed jurisdictional facts concerning the third count of petitioner's complaint. That count appears at R. 28. During oral argument, said Court recognized the importance of legal questions raised by such count. The following are true quotations from the Reporter's Transcript of the Oral Argument presented on that matter on February 15, 1944:

Remarks of Court During Argument of Petitioner.

"Judge Healy. Before you sit down, will you discuss a little more your third count in the Denicke case? What is the theory that underlies that third cause of action? Will you state it again?

Mr. Sargent. The theory is that before this merger the Anglo and London Paris Bank had a fraudulent

balance sheet. It published assets exceeding the true value of its assets. The Federal law provides, your Honor, that every national bank shall publish a statement of its condition twice a year.

Judge Healy. That was the statement called for by the Comptroller from time to time?

Mr. Sargent. Yes." (Page 17, line 24 to page 18, line 5, incl.)

Remarks of Court During Argument of Respondents.

"Judge Healy. There is one more matter, and that is connected with the same subject that I mentioned to you a moment ago. Your contention with respect to the third count of the Denicke case is that incorporation of the allegations of the first count in effect destroys the allegation referring to or having reference to the fraudulent statement put out by the bank.

Mr. Roche. I was coming to that, your Honor.

Judge Healy. I was going to ask you, even assuming that the first count was not incorporated into the third count, would you then concede that there was a Federal question involved?" (Page 37, line 26 to page 38, line 6.)

Remarks of Court During Petitioner's Argument in Rebuttal.

"Judge Healy. Before the consolidation meeting he alleges that is all he got. Would that exclude—or do you so construe it—the bank statement on which you rely in your third count?

Mr. Sargent. No, I think not. He says these documents constituted the only information he received. It is our intention to allege that is all he got; that is all he received. He alleges, however, he relied upon the balance sheet. Now, counsel are incorrect in making the statement it is humanly impossible to reconcile

these accounts. On the contrary, they are entirely consistent. This statement is in the appendix in our brief, page ii to the appendix.

There are two ways to exercise the right under this section 34(a): One is to make a statement in writing of dissent in advance of the meeting; the other way is to go to the meeting and vote against the plan.

Now, Mr. Denicke did not know about this statutory remedy. He relied upon the condition, the report of this bank, being true. He did not expressly state that he read it, but we think that is a quibble. He did read it; he knows what it contained. He alleges he relied upon it. . . .

Judge Healy. Do you contend, however, the complaint sufficiently alleges the reliance of your client upon this bank statement? The third count in this case is the one that gives me difficulty. I will confess that. I do not know about my associates. Neither of you has satisfied me that it does or does not state a cause of action that is cognizable by a Federal Court.

Mr. Sargent. I will address myself to that point. In the first place, a duty to publish a condition report arises from Section 161, 12 U. S. Code, 161, providing that every national banking association shall make three reports a year and publish them. The officers of the bank are to make such a report. That is a part of the National Bank Act.

Section 93 of the same act says generally that directors of national banks are liable for the violation of any provisions of the chapter. Section 161 is a part of the chapter. The two can be read together.

Where a loss is sustained and it is the result of the publication of such a report, an action lies, and it lies in a Federal court. The decision there is Chesbrough

v. Woodworth, decided by the Supreme Court in 244 US 72. That is the authority for that particular cause of action." (Page 44, line 19 to page 46, line 10.)

Reasons for Enlargement of Record by Motion in this Court.

Ernest H. Denicke, the petitioner herein, is a party to Case No. 155 pending in October Term, 1944, and entitled "Ernest H. Denicke, et al., Petitioners, vs. The Anglo California National Bank of San Francisco, et al., Respondents". That matter is hereinafter referred to as the "*Anglo Case*". Petitioner was unable to obtain certified copies of documents in that proceeding. It was necessary to apply for an order in this Court to support enlargement of record.

In said *Anglo* case, the clerk refused to furnish a certified copy of an irregular opinion filed during adjournment. The Court deprived petitioner of the right to argue a motion brought to obtain a copy thereof. Records and files in said *Anglo* case, which should have been public records, were suppressed.

Time for certiorari herein expires July 27, 1944. Order staying mandate expires July 3, 1944. (R. 126.) An application for further stay has been denied by Circuit Judge Clifton Mathews. Petitioner was unable to obtain action thereon by any other judge. Time does not permit application to this Court for such stay.

The conduct exhibited toward petitioner in the *Anglo* case, including suppression of records therein, indicates that no relief can be obtained in the Circuit Court. It is

necessary to file motion for enlargement when certiorari petition is docketed herein. I believe that the only remedy available in the premises is by an application addressed to this Court.

AARON M. SARGENT.

Subscribed and sworn to before me this 23rd day of June, 1944.

(Seal) CATHERINE E. KEITH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires December 16, 1946.